90-638

(1)

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

JOHN BABIGIAN,

Petitioner,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, "NERVOUS NELLIE" DOE, "HORNY HELEN" DOE, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT McGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PIERPONT, NINA CAMERON, FRANCIS T. MURPHY, Individually and as Chief Justice of the Appellate Division of the State of New York: First Department, APPELLATE DIVISION OF THE STATE OF NEW YORK: FIRST DEPARTMENT, MICHAEL GENTILE, as Chief Counsel of the Departmental Disciplinary Committee of the Appellate Division: First Department, HAROLD J. REYNOLDS, Clerk of the Appellate Division: First Department, THE FLORIDA BAR, NORMAN FAULKNER, E. EARLE ZEHMER, ADLAI HARDIN, JR., JOSEPH W. BELLACOSA, RICHARD WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, JAMES R. HAWKINS, WILLIAM J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN BABIGIAN
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QUESTIONS PRESENTED FOR REVIEW

1. Can an attorney be disciplined without notice or a hearing?
2. Is due process required in the investigation of an attorney?
3. Did the District Court err in holding that members of the New York Bar Association's Grievance Committee enjoyed absolute judicial immunity for their conduct during preliminary investigations?
4. Did the District Court err in failing to address the Petitioner's constitutional attack on N.Y. Judiciary Law § 90(10), which gives the Appellate Division unbridled discretion to

keep secret or to divulge at will, all or any part of papers, records or documents generated in a disciplinary action?

5. If sanctions are mandatory under Rule 11 where there are material misrepresentations of the record, failure to cite controlling adverse authority, and frivolous arguments, can a court dismiss the complaint under Rule 12(b) by adopting verbatim all the movants' contentions of the law and the facts?

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STATUTES

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, Babigian v. The Association of the Bar of the City of New York, No. 90-7163 (2d Cir. 1990), and the opinion of the District Court, Babigian v. The Association of the Bar of the City of New York, No. 88-Civ-1123 (S.D.N.Y. 1990), are both unreported. Both opinions are reproduced in the Appendix to this Petition.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 19, 1990. The jurisdiction of this Court to review the judgment of the Second Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this action are 42 U.S.C. § 1983 (1981); N.Y. Jud. Law § 90(10) (McKinney 1983); and Fed. R. Civ. P. 12(b). These provisions are reproduced in the Appendix to this Petition.

STATEMENT OF THE CASE

In 1973, a disciplinary punishment called a letter of admonition was imposed without any notice or a hearing afforded to petitioner. In 1974-75 a preliminary investigation of petitioner ended without any further proceedings.

In 1986, without recourse to the mandated New York Judiciary Law § 90(10), petitioner gained access to his disciplinary file and removed without permission

secret documents which indicated that the punishment was imposed in bad faith, and that the preliminary investigation was instituted and conducted in bad faith (J.A. 27-30; J.A. 96-99; J.A. 100, para. 77; J.A. 101, para. 81).

The above documents form the key evidentiary basis for this action for Civil Rights violations, tort actions, and actions for declaratory relief expunging petitioner's disciplinary record, and attacking the constitutionality of certain disciplinary rules, and New York Judiciary Law § 90(10).

No answers have been filed in this action, commenced in February 1988. Despite requests, the court has never held a conference with the parties (J.A. 396-97).

Between May 16, 1988, and July 11, 1988, three Rule 12(b)(16) motions to dismiss this action were filed by the defendants. The court did not signify any intent to convert to a Rule 56 summary judgment motion.

No affidavits in compliance with Rule 56 were filed by defendants. Petitioner opposed all the motions to dismiss with personal affidavits and extensive memoranda of law (J.A. 216-59, 361-95, 408-39) and also a writ of mandamus (J.A. 439-507).

The evidentiary complaint is 145 pages in length (J.A. 6-150). The supplemental complaint is less than two pages, containing five allegations (J.A. 150-51). Defendants did not move to strike. The court did not hold any

evidentiary hearings on the key issues of long-arm jurisdiction and the statute of limitations.

Petitioner's notice for depositions was aborted by an order of the court dated March 21, 1989 (J.A. 508). The above order was not based on a hearing (J.A. 440).

On December 6, 1989, petitioner's writ of mandamus, to compel the court to render decisions on the motions to dismiss, was denied without opinion (J.A. 5, 439-507).

On January 4, 1990, petitioner filed a complaint against the court for its failure to render a decision; the court complied on January 11, 1990, with a decision dismissing all eight causes of action in the complaint, and the sup-

plemental complaint against the State defendants (J.A. 538-51).

After oral argument on July 18, 1990, the Second Circuit Court of Appeals affirmed summarily the next day on July 19, 1990.

Federal jurisdiction in the court of first instance was based on 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343.

REASONS FOR GRANTING THE WRIT

I. AN ATTORNEY CANNOT BE DISCIPLINED WITHOUT NOTICE OR A HEARING.

In 1973 Petitioner received a disciplinary punishment called a letter of admonition (J.A. 34-35). It was issued in bad faith (J.A. 31-33).

An admonition is discipline imposed without a hearing. Rule 603.9 of the Appellate Division: First Department of the State of New York. It may be considered in determining whether to impose discipline, and the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney. Matter of Wanderman, 100 A.D.2d 309, 474 N.Y.S.2d 111 (1984). The admonition, while not imposed by the court, can lead to a court-imposed punishment against an attorney. Matter of Halpern, 556 N.Y.S.2d 896 (1990).

An attorney's disciplinary proceeding is quasi-criminal in nature and requires the procedural due process, including fair notice of the charge. In re Ruffalo, 390 U.S. 544, 550-51 (1968).

There was, and is, no right to appeal plaintiff's letter of admonition (J.A. 36, 43). Rule 605.8(c) of the Appellate Division: First Department.

When an attorney is wholly passive and unaware of any wrongdoing, the imposition of discipline without notice and a hearing is not warranted by any compelling interest of the State to regulate the practice of law. Goldberg v. Kelly, 397 U.S. 254 (1970).

II. DUE PROCESS IS REQUIRED IN THE INVESTIGATION OF AN ATTORNEY.

As indicated, supra, due process is required in attorney disciplinary proceedings. In re Ruffalo, supra.

There are no rules or regulations regarding the investigation of an attorney in a formal proceeding before the

Departmental Disciplinary Committee in New York City.

To sustain the above would require the untenable contention that the State's interest in the discipline of attorneys justifies an investigation based on mere whim or caprice without good-faith probable cause.

In petitioner's case, counsel claimed he informed me by telephone that a general investigation had been commenced (J.A. 106-107). A glance at the graphic subpoenas served on petitioner indicates the consequences of unbridled investigative powers (J.A. 86, J.A. 112).

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S HOLDING THAT MEMBERS OF THE NEW YORK BAR ASSOCIATION'S GRIEVANCE COMMITTEE ENJOYED ABSOLUTE JUDICIAL IMMUNITY FOR THEIR CONDUCT DURING PRELIMINARY INVESTIGATIONS.

Throughout the proceedings before the Grievance Committee, the Committee members and the Committee's counsel maintained that they were not conducting a disciplinary proceeding, but rather were conducting only an informal preliminary inquisition or investigation (J.A. 104).

In the district court and the court of appeals, the Respondents maintained that the action was barred by absolute immunity. Without citation to any authority other than Respondents' memorandum, the court held "that the Bar association defendants are entitled to absolute immunity from damage claims

arising out of plaintiff's section 1983 and pendent state law claims. See Memorandum in Support of Defendant's Motion to Dismiss, at 33-42, 88 Civ. 1123 (JMC) (S.D.N.Y. June 30, 1988)." It is clear, therefore, that the district court failed to conduct its own analysis of the issue, preferring instead to rely solely on nine pages of the Respondents' memorandum.

The Supreme Court has previously addressed the character of the investigatory stage of a disciplinary proceeding in the State of New York. In Anonymous v. Baker, 360 U.S. 287 (1959), the court characterized this investigatory function as follows:

> An understanding of the nature of the proceedings before the Special Term is first necessary. In New York the traditional powers of the courts over the admission, discipline,

> and removal of members of the bar is placed by law in the Appellate Division of the State Supreme Court. N.Y. Judiciary Law, § 90. When the Appellate Division is apprised of conditions calling for general inquiry it usually appoints, as here, a Justice of the Supreme Court, sitting at Special Term, to make a preliminary investigation. The duties of such a justice are purely investigatory and advisory, culminating in one or more reports to the Appellate Division upon which future action may then be based. In the words of Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, the proceedings at Special Term thus simply constitute a "preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right * * * a quasi administrative remedy whereby the court is given information that may move it to other acts thereafter * * *." People ex rel. Karlin v. Culkin, 248 N.Y. 465, 479, 162 N.E. 487, 492, 60 A.L.R. 851.

Id. at 290-91 (emphasis added).

The Committee's function in the instant case was quite similar to the function described by this Court in Anonymous v. Baker, supra. Thus, it is clear that the Committee functioned in an administrative, rather than judicial capacity, and that the district court erred in dismissing the complaint on the basis of absolute judicial immunity.[1]

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[1]Even if the members of the Grievance Committee were acting in a judicial capacity, they would not be immune from suit for prospective relief or for attorney's fees under 42 U.S.C. § 1988. Pulliam v. Allen, 466 U.S. 522 (1984). Furthermore, if the members of the Grievance Committee had been acting to enforce the Bar Code, and are thus appropriately treated as prosecutors, they would still be "amenable to suit for injunctive and declaratory relief." Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 734-37 (1980). Since such relief was requested in the Petitioner's complaint, the court's dismissal of the complaint in its entirety on the basis of absolute immunity was clearly in error.

The subpoena served on petitioner states, in pertinent part, "to give testimony in a pending preliminary investigation of a complaint[.]" The Bar Association defendants quote the full text of their Rule 603.12 regarding preliminary investigations (J.A. 196). Their Procedures for the Grievance Committee clearly indicate that the preliminary investigative stage was involved (J.A. 38-39). The preliminary nature of the proceedings is graphically set forth in paragraph 87 of the complaint (J.A. 105-106).

The Bar Association defendants failed to cite Anonymous v. Baker, supra. In their Reply Memorandum, they opined that petitioner's citation of the above was "blatantly wrong" (J.A. 267-68). The

court's ruling that they enjoyed absolute judicial immunity is an abuse of discretion since petitioner cited the case in the opposition memorandum of law (J.A. 222-23). The whole point on absolute judicial immunity was again presented to the court in petitioner's Writ of Mandamus (J.A. 474-78).

Pursuant to the ethical duty of counsel to direct the court's attention to the conduct of opposing counsel, petitioner pointed out to the circuit court the ethical lapse of counsel, who argued absolute immunity but did not refer to Anonymous v. Baker, supra. Mylett v. Jeane, 910 F.2d 296, 301 (5th Cir. 1990); In re Gopman, 531 F.2d 262, 265-66 (5th Cir. 1976). The circuit court panel did not respond to petitioner's accusation on

the above, as well as the failure of counsel to cite controlling authority on the issue of post-deprivation remedies. Nor did the panel question counsel. The next day, the circuit court summarily affirmed the district court's decision, including the holding that the Bar Association defendants enjoyed absolute judicial immunity. (Appendix at 2-4.)

IV. THE DISTRICT COURT ERRED IN FAILING TO ADDRESS THE PETITIONER'S CONSTITUTIONAL ATTACK ON N.Y. JUD. LAW § 90(10), WHICH GIVES THE APPELLATE DIVISION UNBRIDLED DISCRETION TO KEEP SECRET OR TO DIVULGE AT WILL, ALL OR ANY PART OF PAPERS, RECORDS, OR DOCUMENTS GENERATED IN A DISCIPLINARY ACTION.

As an examination of the district court's opinion reveals, the court utterly failed to address the Petitioner's

third and fourth causes of action which sought a declaration that N.Y. Jud. Law § 90(10) (McKinney 1983) was unconstitutional, and sought expungement of the Petitioner's disciplinary file (J.A. 144-46).

The statute provides that all papers, records, and documents relating to any complaint or investigation relating to the conduct or discipline of an attorney "shall be sealed and deemed private and confidential." N.Y. Jud. Law § 90(10) [reproduced in its entirety in Appendix]. The statute further provides that "the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents." Id. Further-

more, it is left to the presiding justice whether or not notice should be given to the persons or attorneys affected by any disclosure of material. Id. As the Petitioner has alleged, this statute gives the Presiding Justice of the Appellate Division unfettered control over the investigative files of attorneys (J.A. 145). Under the authority of this statute, an attorney may be subject to investigation and discipline without having the opportunity to see the contents of his disciplinary file. Indeed, this is exactly what happened in the Petitioner's case.

Plaintiff simply asked Gentile for permission to examine the investigative file; N.Y. Jud. Law § 90(10) was not mentioned in plaintiff's letter. Plaintiff

did not request a reexamination of the file from Gentile; he requested copies of enumerated documents in the investigative file to present to Judge Murphy as part of a formal complaint against the Grievance Committee members.

Plaintiff's application under N.Y. Jud. Law § 90(10) to Judge Murphy did not present a case or controversy that could be acted upon by the court of appeals or the United States Supreme Court. In re Summers, 325 U.S. 561, 566-69 (1944). The application did not challenge the validity of N.Y. Jud. Law § 90(10); it was a ministerial request, not a request for judicial determination. Feldman v. Gardner, 213 U.S. App. 119, 661 F.2d 1295, 1315-16 (n.179 discussing Ktsanes v. Underwood, 552 F.2d 740 (7th Cir.

1977), cert. denied, 435 U.S. 933 (1978)) (D.C. Cir. 1981), vacated, 460 U.S. 462 (1983); Rapp v. Committee On Professional Ethics & Conduct, 504 F. Supp. 1092, 1097-98 (S.D. Iowa 1980); Application of L.B. & W. 4217, 238 F.2d 163 (9th Cir. 1956); Matter of Baker, 693 F.2d 925 (9th Cir. 1982); United States v. Melendez-Carrion, 811 F.2d 780, 781 (2nd Cir. 1987). There simply was no procedure for plaintiff to follow. In re Berkan, 648 F.2d 1386, 1389-90 (1st Cir. 1981).

Hence the supplemental complaint is based upon the initial conduct of Judge Murphy and Gentile rejecting plaintiff's complaint, the denial of further access to the investigative file, all the allegations of the complaint (which are deemed true for this motion), the motion

to dismiss by the State defendants which clearly indicates that they have ratified the conduct of the Bar Association defendants, and their conduct in obstructing plaintiff's complaint and covering up the acts of the Bar Association defendants. All the foregoing constitute a continuing tort action and violations of 42 U.S.C. § 1983.

Judge Murphy made the following comment regarding access to disciplinary files in the Roy Cohn case, In the Application of New York News, Inc., 113 A.D.2d 92, 495 N.Y.S.2d 181, 182 (1985):

> "'In the Committee's hundred year history, during which thousands of attorneys have appeared before it, the Committee has been nationally recognized as a model of integrity and industry. In any case, if the Committee were to have been established but a year ago, a good reputation for integrity

and competence is essential to its work as this Court's prosecutorial nominee. In that reputation, the public has a stake. . . .'"

"'When it is shown that a respondent in a pending disciplinary proceeding has publicly accused the disciplinary instrumentality of this Court of having been constituted of incompetents who prosecuted him for a political purpose, upon meritless charges, with the intent of 'smearing' him, good cause has been proved for entry of an order opening the records of that proceeding for public examination. As it cannot lie in the mouth of such a respondent that he may accuse the Committee member of disbarrable offenses by them in their prosecution of him, and yet keep the record of that proceeding beyond public examination upon a claim of statutory confidentiality, it could not have been the Legislature's intent that a respondent's right to confidentiality would extend beyond his making of such an attack upon the Committee's members[.]'"

Plaintiff has standing to sue the State defendants individually for Civil

Rights violations. Javits v. Stevens, 382 F. Supp. 131, 135 (S.D.N.Y. 1987); Evans v. Lynn, 537 F.2d 571, 577-78 (2d Cir. 1975) (inaction as breach of affirmative duties); Smith v. Meese, 821 F.2d 1484, 1493-96 (11th Cir. 1987).

The action taken by the Grievance Committee against the Petitioner stemmed from the Petitioner's lawful exercise of his first amendment rights in advertising his legal research service (J.A. 7, paras. 1, 67 et seq.). As this court has noted, nonmisleading advertising by an attorney falls within the scope of first amendment protection. Bates v. State Bar of Arizona, 433 U.S. 350 (1977); In re R.M.J., 455 U.S. 191 (1982).

Under N.Y. Jud. Law § 90(10), the Grievance Committee is given the ability,

which it exercised in the case at bar, to fabricate complaints and other material, place them in an attorney's file, and use the file as a basis for disciplinary proceedings. Under N.Y. Jud. Law § 90(10), the investigated attorney has no recourse to challenge the material in the file, because, as in the instant case, the attorney can be denied access to the file. Thus, the law can and is used to further the Grievance Committee's function as a "lawyers protective guild" (J.A. 399), and has a chilling effect on the first amendment rights of attorneys.

The district court failed to address this question raised in the Petitioner's complaint, yet the court dismissed the complaint in its entirety. This is

clearly an error which is plain from the record.

In addition, the court failed to address the Petitioner's cause of action for expungement of his disciplinary file. It is well established that the "federal courts have the equitable power 'to order the expungement of government records where necessary to vindicate rights secured by the Constitution or by statute.'" Fendler v. United States Bureau of Prisons, 846 F.2d 550, 554 (9th Cir. 1988); Shanbarger v. District Attorney of Renssellaer County, 547 F.2d 770 (2d Cir. 1976), cert. denied, 430 U.S. 968 (1977); Chastain v. Kelley, 510 F.2d 1232, 1235 (D.C. Cir. 1975). The district court's failure to address the expungement issue, or to set forth its reasons for declining

to exercise its equitable powers in this regard, was clearly erroneous and an abuse of the court's discretion.

V. IF SANCTIONS ARE MANDATORY UNDER RULE 11 WHERE THERE ARE MATERIAL MISREPRESENTATIONS OF THE RECORD, FAILURE TO CITE CONTROLLING ADVERSE AUTHORITY, AND FRIVOLOUS ARGUMENTS, A COURT MAY NOT DISMISS THE COMPLAINT UNDER RULE 12(b) BY ADOPTING VERBATIM ALL THE MOVANTS' CONTENTIONS OF THE LAW AND THE FACTS.

The court's decision adopts verbatim an entire memorandum of law, 30 pages in length, plus 44 pages verbatim from the other memoranda of law by the defendants (J.A. 549-51). No reference whatsoever is made to any contention of fact or law made by petitioner in his affidavits or memoranda of law.

Such uncritical acceptance of the movants' factual and legal contentions is a blatant departure from the proper standard on a Rule 12(b) motion to dismiss, and the practice has been condemned by the federal courts. In DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990), the court of appeals stated that the district court had acted improperly in accepting the reasons set forth in the defendant's brief on a Rule 12(b) motion to dismiss. In condemning this practice, the court stated as follows:

> The judge accepted the "reasons set forth in E & W's briefs" in the district court. Even if we had copies of these briefs (no one supplied them to us), they would be inadequate. A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a

> neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. E.g., Walton v. United Consumers Club, Inc., 786 F.2d 303, 313-14 (7th Cir.1986); In re X-Cel, Inc., 776 F.2d 130 (7th Cir.1985). Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.

Clearly, the district court in the instant case was guilty of this practice. Furthermore, the court of appeals made no attempt to review independently whether the contentions in the movant's memoranda

relied upon by the district court were accurate.

The Supplemental Complaint Clearly States A Cause Of Action.

The court states that the supplemental complaint "contains no specific factual allegations" and in the same sentence continues: "reads in pertinent part as follows: 'Defendants Gentile, Reynolds and Murphy conspired to block an investigation of plaintiff's complaints against the Grievance Committee defendants, and wilfully refuse to grant plaintiff further access to his investigatory file in order to deny plaintiff the evidence required to sustain this action'" (J.A. 548). The court also ignored the final paragraph 159 which states: "The motion for summary judgment against

plaintiff filed by defendants Gentile, Reynolds and Murphy is false and frivolous, and constitutes gross malpractice and intentional negligent misrepresentation" (J.A. 151). Paragraph 155 incorporates the complaint; attention is directed to 144 of the complaint (J.A. 145). There is no pleading requirement of stating facts sufficient to constitute a cause of action, but only that there be a short and plain statement of a claim showing that the pleader is entitled to relief. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944). Depositions of the State defendants were scheduled with notice to the court, which chose to abort them (J.A. 508). The court should have noted the judicial tumult regarding the State defendants (J.A. 509-10, 515-21).

The relationship of Reynolds with the Bar Association defendant Patrick Wall is alleged in paragraphs 156 and 157 (J.A. 150). Under the circumstances, each defendant has sufficient notice of what he is charged with. Goldman v. Belden, 754 F.2d 1059, 1070 (2d Cir. 1985).

It is submitted that even a cursory examination of opposing memoranda of law will indicate the abuse of discretion by the court in adopting verbatim the conclusions of moving counsel (J.A. 327-57, J.A. 361-91).

In deciding a pretrial motion to dismiss a complaint for lack of personal jurisdiction, the court has certain options. It may determine the motion on the basis of affidavits. Here there were no affidavits or even a statement of

facts by Florida counsel, simply his arguments in his memorandum of law, which have no probative value for granting motions. Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d 24, 25 (2d Cir. 1988); Sardo v. McGrath, 186 F.2d 20, 23 (D.C. Cir. 1952).

Even if submitted in affidavit form, statements not based on personal knowledge and thus amounting to hearsay are not sufficient to warrant a motion to dismiss even under Rule 56. Kamen v. American Telephone & Telegraph Co., 791 F.2d 1006, 1011 (2d Cir. 1986).

The court may permit discovery, and, indeed, the court cannot dismiss for want of jurisdiction without discovery. Alliance of American Insurers v. Cuomo, 854 F.2d 591, 597 (2d Cir. 1988). Finally,

the court may conduct an evidentiary hearing on the merits of the motion, but until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting matter presented by the moving party to defeat the motion. Marine Midland Bank N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981).

The arguments or statements of counsel must be warranted by the record. Estate of Detwiler v. Offenbechner, 728 F. Supp. 103, 135 (S.D.N.Y. 1989).

The allegations of the complaint establish an actual conspiracy against appellant (Complaint, J.A. 58-60; J.A. 61-65; J.A. 44-46; J.A. 47-57; J.A. 66-68; J.A. 95, paras. 72, 73; J.A. 100, para. 77; J.A. 101, para. 81; J.A. 103 (4), (5); J.A. 106, para. 89; J.A. 114

(h); J.A. 107, para. 92; J.A. 109(15), (16), (17); J.A. 111, paras. 93, 94, 96; J.A. 115-17; J.A. 118, paras. 99, 100; J.A. 123, paras. 111, 112; J.A. 124-29; J.A. 137, para. 119.

Even accepting the claim of Florida counsel that the only contacts with New York were two (unspecified) letters, there is still a prima facie action for an intentional tort against The Florida Bar. Calder v. Joines, 465 U.S. 783, 789 (1984); Fox v. Boucher, 794 F.2d 34, 35 (2d Cir. 1986); David v. Weitzman, 677 F. Supp. 95, 99 (S.D.N.Y. 1987) discussing Brown v. Flowers, 688 F.2d 328 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983).

The court's own decision in Ghazoul v. International Management Services,

Inc., 398 F. Supp. 307 (S.D.N.Y. 1975), is dispositive of the issues of a prima facie showing of jurisdiction. The court held that a conspiracy between a party, who is never present in New York, and a co-conspirator who carries out the tortious activities in New York, subjects the out-of-state conspirator to long-arm jurisdiction in New York pursuant to N.Y. Civ. Prac. L. & R. § 302(a)(2) (McKinney 1990). Ghazoul v. International Management Services, Inc., supra, 398 F. Supp. at 310.

The court pointed out:

> "Where 'determination of factual disputes central to the assertion of jurisdiction may be dispositive of questions of liability as well [as jurisdiction], the plaintiff need only show "threshold" jurisdiction sufficient to demonstrate the fairness of allowing the suit to continue. The parties are

> not bound by the court's jurisdictional findings of fact when the case comes to trial on the merits'."

Id. at 309 (quoting Hatfield v. Power Chemical Co., 382 F. Supp. 388, 390 (D. Md. 1974)).

The court and all counsel have overlooked the key conspiratorial allegation of paragraph 77 of the complaint, which states and appears as follows:

> "77. Also, unbeknownst to plaintiff, prior to February, 1986, Norman Faulkner on November 6, 1974, again wrote to Bonomi, stating that plaintiff's fee schedule for legal research reports was a fraud, and that immediate action should be taken against plaintiff in New York. The above letter is in plaintiff's investigative file."

(J.A. 100.)

The aforementioned paragraph of the complaint clearly establishes an infer-

ence of conspiracy between Bonomi and the Florida defendants. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Firman v. Abreu, 691 F. Supp. 811, 813-14 (S.D.N.Y. 1988). See excellent analysis of civil rights conspiracy in Hampton v. Hanrahan, 600 F.2d 600, 620-24 (7th Cir. 1979).

In a subsequent case, citing its decision in Ghazoul v. International Management Services, Inc., supra, 398 F. Supp. at 309, the court in American Contract Designers v. Cliffside, Inc., 458 F. Supp. 735, 737, stated:

> "In deciding the instant motion, the Court has relied on the affidavits of the parties to establish jurisdictional facts. . . . These are for the most part undisputed, but where there is a dispute the Court has set forth the respective contentions of the parties, mindful of the fact that it

> must consider the pleadings and affidavits in the light most favorable to the plaintiff[.]"

(Citations omitted.)

The court's findings of fact regarding the Florida complaints are clearly erroneous, and they are adopted verbatim from the Bar Association's moving papers. The court states "Morris Gutt . . . notified plaintiff by letter of the complaint and requested that plaintiff set forth his position" (J.A 542). Gutt simply announced that a Florida complaint had been received, did not specify in any way the precise nature of the complaint, misrepresented the complaint as from a private attorney in Florida, and requested appellant to set forth his position, not on any Florida complaint, but on Bonomi's admonitory letter (J.A. 66-68, J.A. 72-

73). The court then states that "the hearing plaintiff had requested began on November 13, 1974, and continued on December 4, 1974, and January 29, 1975," implying that appellant requested a hearing on the Florida complaint. Appellant requested a hearing on Bonomi's admonitory letter (J.A. 72, 73; J.A. 122, para. 106). There was no hearing on the Florida complaint because it was never placed on the record during the meeting, despite petitioner's request for specification of its nature (J.A. 103(4)(5), J.A. 114(h), J.A. 115-18). Petitioner never saw the first Florida complaint until after the meetings were completed, and the Bar Association revealed it as an exhibit in their answer to petitioner's federal action (J.A. 123, para. 111).

The court states:

> [I]t is clear from plaintiff's complaint that he did know the identity of the author of the Florida Bar complaint. Finally, in regard to the letter from Bonomi to counsel for the Florida Bar which allegedly stated that action would be taken against plaintiff, plaintiff fails to explain how such a letter would give rise to claim. Furthermore, it is unclear how plaintiff's lack of awareness of such a letter until 1986 prevented plaintiff from having knowledge of the facts necessary to commence the instant action."

(J.A. 546, 547.)

The Bar Association said the same thing: "Finally as to item 5, the letter from John Bonomi to counsel for the Florida Bar which purportedly stated that action would be taken against the plaintiff, plaintiff does not attach this letter to the complaint. His pleading fails to explain how the fact or exist-

ence of such a letter would in any way give rise to a claim, or how plaintiff's lack of awareness of such a letter until 1986 prevented him from otherwise having full knowledge of all pertinent facts necessary to file the type of action the plaintiff has now commenced against the defendants" (J.A. 174).

While petitioner knew the identity of the author and his first complaint, he did not know until 1986 that the same author had written a second complaint letter which charged petitioner with fraud. That second complaint letter, and Bonomi's reply, that they should get together in New Orleans to discuss petitioner's activities, is concrete proof of a conspiracy. The second letter is also proof of a reckless rendition of an opin-

ion. Also, that second complaint letter belies the defense of good-faith probable cause which petitioner faced in 1975. Duchesne v. Sugarman, 566 F.2d 817, 831-32 (2d Cir. 1977).

The above--as will be demonstrated with the rest of the court's findings--clearly indicates that the court uncritically accepted all the defendants' version of the facts and the law, and ignored the allegations of the complaint and petitioner's opposition papers.

This action was filed in February 1988. Although requested twice by petitioner, the court has never held a conference with petitioner and opposing counsel.

Chief Justice Burger wrote in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974):

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."

The Court then went on to quote from Conley v. Gibson, 355 U.S. 41, 45-46 (1957):

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

(Emphasis added.)

An abuse of discretion is found when an appellate court is convinced that there was the commission of an error of law, a judgment clearly against logic, or a conclusion against the reasonable and probable deductions to be drawn from the disclosed facts. Coca Cola Co. v. Tropicana Products, Inc., 690 F.2d 312, 315 (2d Cir. 1982).

Where a court uncritically accepts findings and conclusions of counsel after announcing a proposed decision in that party's favor, the finding is clearly

erroneous. Anderson v. City of Bessemer, 470 U.S. 564, 572 (1985). The abuse of discretion standard implies that the judge must actually exercise his discretion. United States v. United States Currency in the Amount of $103,387.27, 863 F.2d 555, 561 (7th Cir. 1988). An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered. Id. at 561. The clearly erroneous standard of review applies to all findings without distinction between subsidiary and ultimate facts. Marine Transport Lines, Inc. v. International Organization of Masters, Mates & Pilots, 878 F.2d 41, 45 (2d Cir. 1989). It is improper for the court to dismiss an action on the basis of inferences unfavorable to the

nonmoving party. Beyah v. Coughlin, 789 F.2d 986, 990 (2d Cir. 1986).

The court's failure to consider its own decision is a manifest disregard of the applicable law. Fried. Krupp. GmbH v. Solidarity Carriers, Inc., 674 F. Supp. 1022, 1026 (S.D.N.Y. 1987); Karovos Compania Naviera, S.A. v. Atlantica Export Corp., 588 F.2d 1, 8 (2d Cir. 1978).

This Court has roundly condemned the procedure of adopting in toto all the findings of fact and of law submitted by one party. International Controls Corp. v. Vesco, 490 F.2d 1334, 1341 n.6 (2d Cir.), cert. denied, 417 U.S. 932 (1974). The rationale is stated in Russo v. Central School District, 469 F.2d 623, 628 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973) as follows:

> "Findings that are nothing but cold rhetoric, couched in extraordinarily broad and general terms, and stripped of underlying analysis or justification or an accompanying memorandum or opinion shedding some light on the reasoning employed, invite closer scrutiny, especially when the case concerns fundamental constitutional freedoms. . . . The need for precision and clarity in fact-finding and the use of cold conclusory statements as a shield to prevent penetrating the absence of facts is made more significant because of the 'clearly erroneous' standard, for while errors of law are always correctable by an appellate court, errors of fact rarely are, unless an appellant can scale the high wall which that standard places before him. It stands to reason that unless due care is given to the process of fact finding, the reliability of the district court's conclusions will be subject to question, thus compelling a reviewing court to scrutinize the findings with a sharper eye than is ordinarily appropriate."

(Citation and footnote omitted.)

In United States v. Forness, 125 F.2d 928, 942 (2d Cir.), cert. denied, City of Salamanca v. United States, 316 U.S. 694 (1942), Judge Frank wrote:

> "The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked 'An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principle."' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding;

> for such lack of due care is less likely to reveal itself than lack of scruples, which we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standard."

(Footnotes omitted.)

The court echoes the Attorney General's opinion that the statute of limitations bars a constitutional attack on the present disciplinary rules. The New York Court of Appeals disagrees. Kirn v. Noyes, 31 N.Y.S.2d 90, 92-93, 262 A.D.2d 581, 583, appeal denied, 263 A.D.2d 905 (1942). Also, tolling of the statute of limitations applies for fraud and breach of trust. Ernst v. Ernst, 40 Misc. 2d

934, 941, 243 N.Y.S.2d 917, 924 (1973); In re Tarbells Estate, 99 N.Y.S.2d 902, 905 (1950).

The statute of limitations as to all parties is not applicable, as there is a material issue of fact as to whether the State defendants have ratified the Bar Association's acts, and whether a continuing tort is now involved. Rochon v. FBI, 691 F. Supp. 1548, 1564 (D.D.C. 1988); Pope v. Bond, 641 F. Supp. 489, 499-500 (D.D.C. 1986); Cohen v. Goodfriend, 642 F. Supp. 95, 101 (E.D.N.Y. 1986); Richards v. New York State Department of Correctional Services, 572 F. Supp. 1168, 1176 (S.D.N.Y. 1983).

The uncertainty as to the true state of any material fact defeats a motion to dismiss. Quinn v. Syracuse Model Neigh-

borhood Corp., 613 F.2d 438, 445 (2d Cir. 1980). Once a material issue of fact is found to exist, the motion must be denied and the case must proceed to trial. United States v. One Tintoretto Painting, 691 F.2d 603, 606 (2d Cir. 1982).

The definition of an unresolved factual issue is one that a reasonable fact-finder could decide in favor of either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Defendants must carry a heavy burden before the court can dismiss plaintiff's fraud and concealment allegations without trial. Defendants must show that even when all ambiguities in the evidence are resolved, and all inferences drawn in favor of plaintiff, there are no material issues genuinely in dispute. Schering

Corp. v. Home Insurance Co., 712 F.2d 4 (2d Cir. 1983); Heyman v. Commerce & Industry Co., 524 F.2d 1317 (2d Cir. 1975). Since the allegations of bad faith, fraud, and misrepresentation are actually documented in the complaint, the doctrine of equitable estoppel is an issue for the jury, and not the judge. Music Research, Inc. v. Vanguard Recording Society, 547 F.2d 192, 194-95 (2d Cir. 1976); cf. Dillman v. Combustion Engineering, Inc., 784 F.2d 57, 60-61 (2d Cir. 1986).

The issue of the statute of limitations should not be decided on a motion for summary judgment. Renda v. Frazer, 100 Misc. 2d 511, 419 N.Y.S.2d 857, 863, aff'd, 75 A.D.2d 490, 429 N.Y.S.2d 944 (1974); Schmidt v. Kay, 555 F.2d 30, 37

(2d Cir. 1977). Much less should a motion to dismiss under Rule 12(b)(6). Competitive Associates, Inc. v. Fantastic Fudge, Inc., 58 F.R.D. 121, 123 (S.D.N.Y. 1973). Even with affidavits by movants, which is not present here, it is still an issue of fact on a motion to dismiss. Hanna v. United States Veterans Administration Hospital, 514 F.2d 1092, 1094-95 (3d Cir. 1975).

Actual knowledge on petitioner's part in the present action is too inherently factual to provide a basis for dismissal. Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir. 1979); Friedman v. Meyers, 482 F.2d 435, 439 (2d Cir. 1973); Yeadon v. New York City Transit Authority, 719 F. Supp. 204, 209-10 (S.D.N.Y. 1989). The same is true for

due diligence. Barrett v. United States, 689 F.2d 324, 329-30 (2d Cir. 1982). The burden is on the defendants to come forth with any facts that due diligence would have discovered the evidence where the same defendants have concealed the very cause of action. Richards v. Mileski, 662 F.2d 65, 70-71 (D.C. Cir. 1981).

It is sufficient for fraudulent concealment when a conspiracy is by its nature self-concealing. State of New York v. Hendrickson Brothers, Inc., 840 F.2d 1065, 1083-85 (2d Cir.), cert. denied, 109 S. Ct. 128 (1988). Mere non-disclosure may be enough if there is a fiduciary duty or other affirmative obligation to make disclosure. Glazer Steel Corp. v. Toyomenka, Inc., 392 F. Supp. 500, 503 (S.D.N.Y. 1974).

All the above considerations are set forth in Socialist Workers Party v. Attorney General of United States, 642 F. Supp. 1357, 1413 (S.D.N.Y. 1986) (J.A. 229-32).

There is also the issue of the public policy of allowing the most prestigious Bar Association to bar petitioner from claiming his rights when the availability of the concealment defense was obtained by them in such an unworthy manner, and would not only grant them a windfall to which they are not entitled, but will encourage other bar associations and disciplinary bodies to mislead the court deliberately. Stone v. Williams, 891 F.2d 401, 405 (2d Cir. 1989). The statute of limitations does not apply where an attorney's professional miscon-

duct is involved. Matter of O'Hara, 63 A.D.2d 500, 408 N.Y.S.2d 70, 72 (1st Dep't 1978).

Should attorneys who commit crimes in conducting disciplinary proceedings be allowed to avail themselves of the statute of limitations?

Post-Deprivation Procedures

The court states "Plaintiff did not take any further judicial action by way of an Article 78 proceeding or otherwise" (J.A. 543). The court does not specify precisely what legal action could be taken prior to the filing of charges. Nor does the Bar Association specify any procedural steps, being content to cite Marino v. Ameruso, 837 F.2d 45, 47 (2d Cir. 1988), which does not involve a

disciplinary proceeding (J.A. 202). Petitioner's opposition Memorandum of Law clearly made the point that until charges are made, forget it (J.A. 236-38). The same point was recently made in Mason v. Departmental Disciplinary Committee, 894 F.2d 512 (2d Cir. 1990).

The citation of Marino is frivolous. Marino made no showing of inadequate state procedures.

When counsel cited the Marino case before the circuit court, petitioner called it to the attention of the court to no avail.

There were no charges made against petitioner after the investigation. Let the respondents specify what state procedures were available to petitioner.

As the foregoing discussion shows, the court clearly failed to apply the proper standard on a Rule 12(b) motion to dismiss. Furthermore, the court's deviation from this standard and the court of appeals' sanctioning of this deviation are so profound that the exercise of this Court's supervisory powers is justified.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted, or in the alternative the case should be remanded for further proceedings.

Respectfully submitted,

John H. Babigian
Pro se

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1990

JOHN BABIGIAN,

Petitioner,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, "NERVOUS NELLIE" DOE, "HORNY HELEN" DOE, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT McGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PIERPONT, NINA CAMERON, FRANCIS T. MURPHY, Individually and as Chief Justice of the Appellate Division of the State of New York: First Department, APPELLATE DIVISION OF THE STATE OF NEW YORK: FIRST DEPARTMENT, MICHAEL GENTILE, as Chief Counsel of the Departmental Disciplinary Committee of the Appellate Division: First Department, HAROLD J. REYNOLDS, Clerk of the Appellate Division: First Department, THE FLORIDA BAR, NORMAN FAULKNER, E. EARLE ZEHMER, ADLAI HARDIN, JR., JOSEPH W. BELLACOSA, RICHARD WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, JAMES R. HAWKINS, WILLIAM J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

JOHN BABIGIAN
Petitioner Pro Se
One Christopher Street
New York, New York 10014
(212) 374-8041

APPENDIX

SDNY
88-civ-1123
CANNELLA

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of July one thousand nine hundred and ninety.

Present:

Honorable Ralph K. Winter,
Honorable J. Daniel Mahoney,
Honorable John M. Walker, Jr.,
Circuit Judges.

JOHN BABAJIAN,
Plaintiff-Appellant,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, "NERVOUS NELLIE" DOE, "HORNY HELEN" DOE, STANLEY

ORDER
90-7163

ARKIN, WILLIAM HELLERSTEIN, ROBERT McGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PIERPONT, NINA CAMERON, FRANCIS T. MURPHY, Individually and as Chief Justice of the Appellate Division of the State of New York: First Department, APPELLATE DIVISION OF THE STATE OF NEW YORK: FIRST DEPARTMENT, MICHAEL GENTILE, as Chief Counsel of the Departmental Disciplinary Committee of the Appellate Division: First Department, HAROLD J. REYNOLDS, Clerk of the Appellate Division: First Department, THE FLORIDA BAR, NORMAN FAULKNER, E. EARLE ZEHMER, ADLAI HARDIN, JR., JOSEPH W. BELLACOSA, RICHARD WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, JAMES R. HAWKINS, WILLIAM J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, and FREDERICK C. CARVER,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United

States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

The district court dismissed appellant's pro se civil rights claims pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that all of appellant's claims under 42 U.S.C. § 1983 (1982) accrued more than three years prior to his filing of the instant action and therefore are barred by the applicable statute of limitations. See Owens v. Okure, 109 S. Ct. 573 (1989) (statute of limitations for Section 1983 actions brought in federal court in New York is state's three-year statute of limitations for personal injury actions). We agree that all of appellant's claims are time-barred, and we affirm for substantially the reasons

stated in the district court's opinion. See Babigian v. Association of the Bar of New York, No. 88 Civ. 1123 (JMC), slip op. at 7-11 (S.D.N.Y. Jan. 11, 1990) (Memorandum and Order).

Affirmed.

Hon. Ralph K. Winter, U.S.C.J.

Hon. J. Daniel Mahoney, U.S.C.J.

Hon. John M. Walker, Jr., U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN BABIGIAN,

Plaintiff,

-against-

MEMORANDUM
AND ORDER

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, "NERVOUS NELLIE" DOE, "HORNY HELEN" DOE, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT McGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PIERPONT, NINA CAMERON, FRANCIS T. MURPHY, individually and as Chief Justice of the Appellate Division of the State of New York: First Department, APPELLATE DIVISION OF THE STATE OF NEW YORK; FIRST DEPARTMENT, MICHAEL GENTILE, as Chief Counsel of the Departmental Disciplinary Committee of the Appellate Division: First Department, HAROLD J. REYNOLDS, Clerk of the Appellate Division: First Department,

88 Civ. 1123 (JMC)

Pro Se

THE FLORIDA BAR, NORMAN FAULKNER, E. EARLE ZEHMER, ADLAI HARDIN, JR., JOSEPH W. BELLACOSA, RICHARD WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, JAMES R. HAWKINS, WILLIAM J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER,

Defendants.

CANNELLA, D.J.:

Defendants' motions to dismiss are granted. Fed. R. Civ. P. 12(b)(6).

BACKGROUND

Plaintiff, an attorney appearing pro se, brings the instant action pursuant to 42 U.S.C. § 1983, seeking damages and various forms of declaratory and injunctive relief for alleged violations of his constitutional rights. In addition, plaintiff seeks damages and injunctive

relief for various state common law and statutory violations. Plaintiff's allegations all arise from attorney disciplinary proceedings which occurred between 1973 and 1975. Plaintiff has also filed a Supplemental Complaint which apparently involves events occurring after 1975.

Defendants Association of the Bar of the City of New York ["Association of the Bar"], John Bonomi, former General Counsel to the Committee on Grievances of the Association of the Bar, Robert McGuire, Patrick Wall, Adlai Hardin, Jr., Joseph W. Bellacosa, Richard W. Wallach, Stephen Kaye, Jeffrey K. Brinck, Alvin Schulman, Seth Rosner, Jonathan H. Churchill, William J. Manning, Meredith M. Brown, Robert D. Sack, and Frederick C. Carver, former members of the Committee on Pro-

fessional Ethics of the Association of the Bar [the "Ethics Committee"], and Stanley Arkin, William Hellerstein, Powell Pierpont, Martin Fogelman, Robert McGuire, Eleanor Piel, Patrick Wall and Nina Cameron, former members of the Committee on Grievances of the Association of the Bar [the "Grievance Committee"] [all of the aforementioned defendants collectively referred to as the "Bar Association defendants"], now move to dismiss on the following grounds: (1) plaintiff's claims are barred by the applicable statutes of limitation; (2) the defendants are protected from all of plaintiff's claims for damages by absolute immunity; (3) plaintiff has failed to state facts which constitute a claim under 42 U.S.C. § 1983 or under any of the state law claims alleged; and (5)

plaintiff's complaint violates the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure.

In addition, defendants Appellate Division of the Supreme Court of the State of New York, First Department ["First Department"], Hon. Francis T. Murphy, Presiding Justice, Michael Gentile and Harold J. Reynolds [collectively, the "State defendants"] move to dismiss the complaint on the grounds that, inter alia, plaintiff's claims for declaratory relief are barred by the applicable statute of limitations. State defendants also move, on various grounds, to dismiss plaintiff's Supplemental Complaint. Finally, defendants the Florida Bar, Norman Faulkner and E. Earle Zehmer [the "Florida Bar defendants"] move to dismiss, inter alia, on the ground that

the Court lacks personal jurisdiction.

FACTS

In 1965 plaintiff organized Attorneys' Research, Inc. ["Research, Inc."], a business designed to provide legal research to attorneys in all jurisdictions. Complaint, ¶ 4. Plaintiff advertised Research, Inc. in the New York Law Journal and, in addition, mailed advertisements directly to attorneys. Complaint, ¶¶ 10, 11.

In September 1965, the Association of the Bar received a complaint about Research, Inc. from the Hawaiian Bar Association. Complaint, ¶ 5. At the suggestion of the Executive Director of the Association of the Bar, plaintiff submitted the question of the propriety of the activity of Research, Inc. to the

Association's Ethics Committee for an opinion. On March 22, 1966, the Ethics Committee sent plaintiff an opinion letter stating that while it was not improper for Research, Inc. to perform legal research as long as it was for other attorneys, the company's advertising brochure did not in all respects comply with the requirements of the Canons of Professional Ethics concerning advertising. Complaint, ¶ 7.

In April 1972, defendant John Bonomi, then Chief Counsel to the Grievance Committee, received another complaint concerning advertising by Research, Inc. from an American lawyer living in London. Complaint, ¶ 17. Bonomi referred the matter to the Ethics Committee, asking for an opinion on the propriety of plaintiff's advertising. In March 1973, the

Ethics Committee sent Bonomi an opinion letter [the "Ethics Opinion"] which concluded that plaintiff had violated certain provisions of the Code of Professional Responsibility and that the activities of Research, Inc. may constitute the unauthorized practice of law. Complaint, ¶ 21. After receiving the Ethics Opinion, Bonomi issued an admonitory letter to plaintiff dated November 7, 1973. Complaint, ¶ 34. The admonitory letter notified plaintiff of the complaint by the attorney in London and advised plaintiff that his solicitation letters and the New York Law Journal advertisement violated the standards set out in the Code of Professional Responsibility.

In April 1974, the Grievance Committee received yet another complaint con-

cerning plaintiff's advertising, this time from defendant the Florida Bar. Complaint, ¶ 40. Morris Gutt, Associate Counsel to the Committee on Grievances of the Association of the Bar, notified plaintiff by letter of the complaint and requested that plaintiff submit a statement setting forth his position. Plaintiff responded with a brief letter stating that it was his belief that the advertisements were proper. Thereafter, Gutt asked that plaintiff supply the Grievance Committee with further information. Plaintiff requested a hearing and refused to supply the information sought by the Grievance Committee. Complaint, ¶¶ 53, 55.

Subsequently, the Grievance Committee, by subpoena, directed Research, Inc. to produce the information that had been

previously requested. Complaint, ¶ 65. In addition, Gutt drafted an internal hearing memorandum [the "Hearing Memorandum"] to prepare the members of the Grievance Committee for the upcoming hearing. Complaint, ¶ 74. The hearing plaintiff had requested began on November 13, 1974, and continued on December 4, 1974 and January 29, 1975. Complaint, ¶¶ 83, 84, 98, 107. Plaintiff alleges that he testified at the hearings, but that he was refused any opportunity to present his case or rebut the accusations made by the Grievance Committee. Complaint, ¶¶ 86, 87, 109. Plaintiff also alleges that the hearing transcript was tampered with. Complaint, ¶ 97.

Prior to the final hearing on January 29, 1975, plaintiff sought to enjoin the disciplinary proceedings by filing a

federal action entitled Attorneys' Research, Inc. and John Babigian v. Association of the Bar of the City of New York, 75 Civ. 359 (MEL). Complaint, ¶¶ 57, 105. The action was subsequently dismissed based on the abstention doctrine.

The investigation was finally closed when the Grievance Committee received from the County Lawyers Association's Committee on Unlawful Practice of Law a notice that the latter had reached an agreement with plaintiff concerning the practices of Research, Inc. Complaint, ¶ 118. Bonomi notified plaintiff that the Grievance Committee was closing its file in the matter on May 16, 1975. Complaint, ¶ 118.

There is no allegation that any further disciplinary action was taken

against plaintiff after May 16, 1975.[1] Plaintiff did not take any further judicial action by way of an Article 78 proceeding or otherwise after the Grievance Committee closed its file.

Lastly, plaintiff alleges that he attempted to gain access to his disciplinary file, but that he did not succeed until 1986. Complaint, ¶ 120. Plaintiff also alleges that he has tried to gain access to his file for a second time, but has been unsuccessful. Complaint, ¶ 143-45.

DISCUSSION

On a motion to dismiss, a court must assume that the allegations contained in the complaint are true. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Furthermore, a complaint should not be dismissed

pursuant to Rule 12(b)(6) unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. A court's function "is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985).

I. Statute of Limitations

The Civil Rights Acts, 42 U.S.C. §§ 1981 et seq., do not provide their own limitations periods. See Burnett v. Grattan, 468 U.S. 42, 48 (1984). Thus, the Supreme Court has held that courts entertaining claims brought pursuant to section 1983 should borrow the state statute of limitations for personal injury actions. See Wilson v. Garcia, 471

U.S. 261, 276 (1985). The Court of Appeals for the Second Circuit has held, in light of Wilson, that the statute of limitations in New York for a section 1983 claim is three years. See Okure v. Ownes, 816 F.2d 45, 49 (2d Cir. 1987) (concluding that the general personal injury statute with its three year limit is most analogous to section 1983 claims), aff'd, 109 S. Ct. 573 (1989). Plaintiff filed the instant complaint on February 18, 1988. Thus, plaintiff's section 1983 claim is timely only if it accrued on or after February 18, 1985. Cf. Payne v. Geary, 651 F. Supp. 1357, 1358 (E.D.N.Y. 1987) (limitations period measured from date cause of action accrued to date when action is commenced by filing complaint in federal court).

In determining when an action ac-

crues under section 1983, courts look to federal law. See Pauk v. Board of Trustees, 654 F.2d 856, 859 (2d Cir. 1981), cert. denied, 455 U.S. 1000 (1982). Under federal law, a cause of action accrues when "the plaintiff 'knows or has reason to know' of the injury that is the basis of his action." Pauk, 654 F.2d at 859 (quoting Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981)). Thus, in order to determine when plaintiff's cause of action accrued, the Court must identify the wrong that is the basis of plaintiff's action.

Viewing the complaint in the light most favorable to plaintiff, the gravamen of plaintiff's section 1983 claim is that plaintiff was denied due process during his disciplinary proceedings and that he

was disciplined for constitutionally protected advertising. It is clear from the complaint, however, that plaintiff had full knowledge of any alleged constitutional injury at the time of the events in question, which occurred between 1973 and 1975. The Court finds that plaintiff's section 1983 claim accrued at the latest on May 16, 1975, when the Grievance Committee advised plaintiff that it was closing its file on the matter. There is no allegation that any further disciplinary action against plaintiff occurred after May 16, 1975. As plaintiff did not institute the instant action until almost thirteen years after his cause of action accrued, plaintiff's section 1983 claim is time barred. For the same reasons, plaintiff's pendent state law claims are also time barred.[2]

In an attempt to counter defendants' statute of limitations defense, plaintiff argues that he was unaware of certain information and correspondence until February 1986, when he was permitted to view his disciplinary file. Plaintiff asserts, therefore, that the applicable statute of limitations should be tolled and, in addition, that defendants should be estopped from raising the statute of limitations defense because of their allegedly improper conduct.

Questions of tolling and application of state statutes of limitations are governed by state law. See Wilson, 471 U.S. at 269 (length of limitations period and closely related questions of tolling and application governed by state law). Plaintiff claims that the applicable statute of limitations should be tolled

because until 1986 he was unaware of (1) the 1972 complaint letter from the attorney in London; (2) the 1973 Ethics Opinion; (3) the 1974 Hearing Memorandum prepared by Morris Gutt; (4) the true identity of the writer of the 1974 letter of complaint from the Florida Bar; and (5) the letter from Bonomi to counsel for the Florida Bar stating that action would be taken against plaintiff.

The Court finds that none of the aforementioned items serve to toll the statute of limitations. All relevant information regarding the letter of complaint from the London attorney and the matters discussed in the 1973 Ethics Opinion were set forth in the admonitory letter sent to plaintiff. Moreover, the 1974 Hearing Memorandum does not contain any new or previously unknown matters.

Additionally, it is clear from plaintiff's complaint that he did know the identity of the author of the Florida Bar complaint. See Complaint, ¶ 112. Finally, in regard to the letter from Bonomi to counsel for the Florida Bar which allegedly stated that action would be taken against plaintiff, plaintiff fails to explain how such a letter would give rise to claim. Furthermore, it is unclear how plaintiff's lack of awareness of such a letter until 1986 prevented plaintiff from having knowledge of the facts necessary to commence the instant action. It is clear that plaintiff knew from at least 1975 of the basic facts necessary to make out his numerous causes of action. Thus, plaintiff's allegation that he was unaware of certain correspondence

cannot serve to toll the statute of limitations.

Plaintiff's attempt to invoke the doctrine of equitable estoppel is equally without merit. "Under New York law, a defendant will be equitably estopped from asserting a statute of limitations defense if the defendant's misconduct causes the delay between the accrual of the cause of action and the institution of the legal proceeding." Salahuddin v. Coughlin, 647 F. Supp. 49, 52 (S.D.N.Y. 1986). The Court finds nothing in the complaint, however, which would indicate that defendants engaged in any misconduct that caused plaintiff to delay the institution of these proceedings. As stated above, plaintiff knew the basic facts necessary to institute his claim. "Courts do not view with favor a claim of

estoppel grounded in fraud where it appears the basic facts were known to the claimant within the [limitations period]." Augstein v. Levey, 3 A.D.2d 595, 598, 162 N.Y.S.2d 269, 273 (1st Dep't 1957), aff'd, 4 N.Y.2d 791, 149 N.E.2d 528, 173 N.Y.S.2d 27 (1958).

Finally, it is clear that plaintiff did not act with due diligence in seeking to obtain the documents in his disciplinary file. This is an additional bar to plaintiff invoking the doctrine of equitable estoppel. See, e.g., Simcuski v. Saeli, 44 N.Y.2d 442, 450, 377 N.E.2d 713, 717, 406 N.Y.S.2d 259, 263 (1978) ("due diligence on the part of the plaintiff . . . is an essential element for

the applicability of the doctrine of equitable estoppel").

All the relevant events comprising plaintiff's claims occurred between 1973 and 1975. Thus, the Court finds that plaintiff's federal claims as well as his pendent state claims are barred by the applicable statute of limitations. Accordingly, the complaint is dismissed.[3] Fed. R. Civ. P. 12(b)(6).

II. Supplemental Complaint

Plaintiff has filed a Supplemental Complaint which adds a cause of action for damages against the State defendants. The Supplemental Complaint, which contains no specific factual allegations, reads in pertinent part as follows: "Defendants Gentile, Reynolds and Murphy conspired to block an investigation of plaintiff's complaints against the Griev-

ance Committee defendants, and wilfully refuse to grant plaintiff further access to his investigatory file in order to deny plaintiff the evidence required to sustain this action." Supplemental Complaint, ¶ 158.[4]

State defendants move on various alternate grounds to dismiss the Supplemental Complaint. Plaintiff opposes the motion. After carefully reviewing and considering the arguments submitted by the parties, the Court finds that the Supplemental Complaint clearly fails to state a claim against any of the State defendants. Accordingly, for the reasons stated in the Memorandum of Law in Support of the State Defendants' Motion to Dismiss the Supplemental Complaint, 88 Civ. 1123 (JMC) (S.D.N.Y. May 26, 1989), the Supplemental Complaint is dismissed. Leave to replead is denied.

CONCLUSION

Defendants' motions to dismiss are granted. Fed. R. Civ. P. 12(b)(6). The Clerk of the Court is directed to enter judgment for defendants and to dismiss the Complaint and the Supplemental Complaint.

SO ORDERED.

JOHN M. CANNELLA
United States District
Judge

Dated: New York, New York
January 11, 1990

FOOTNOTES

1.The complaint contains few allegations of any kind about events that occurred after the Grievance Committee's investigation was terminated in May 1975. Plaintiff does allege that in December 1975, there was correspondence between Bonomi and the Florida Bar concerning whether the latter should create a spe-

cial budget to prosecute plaintiff. Complaint, ¶ 119. Plaintiff also alleges that he subsequently applied for a position as a Housing Court Judge and that he revealed the details of the disciplinary investigation. Complaint, ¶ 121. Plaintiff implies that he did not become a Housing Court Judge because of the disciplinary proceedings.

2.Plaintiff's state law tort claims against the Bar Association defendants are time barred because all the activities giving rise to these alleged claims occurred between 1973 and 1975. See Memorandum in Support of Defendants' Motion to Dismiss, at 22-24, 88 Civ. 1123 (JMC) (S.D.N.Y. June 30, 1988). Similarly, plaintiff's challenges to the constitutionality of the rules and regulations of the First Department and the Departmental Disciplinary Committee are time barred as well for the reasons stated in the State defendants' memorandum of law. See Memorandum of Law in Support of the State Defendants' Motion to Dismiss the Complaint, at 35, 88 Civ. 1123 (JMC) (S.D.N.Y. July 11, 1988).

3.Since the Court finds that all of plaintiff's claims are time-barred, it need not discuss in detail the alternate grounds raised by defendants in their motions to dismiss. The Court notes, however, that for the reasons set forth in defendants' detailed and well documented moving papers, plaintiff's complaint is subject to dismissal on various alternate theories.

First, the Court finds that the Bar Association defendants are entitled to absolute immunity from damage claims arising out of plaintiff's section 1983 and pendent state law claims. See Memorandum in Support of Defendants' Motion to Dismiss, at 33-42, 88 Civ. 1123 (JMC) (S.D.N.Y. June 30, 1988). Second, plaintiff's section 1983 claim is insufficient because there were adequate state post-deprivation procedures to rectify any alleged wrong. See id. at 43-44. Third, the Court lacks subject matter jurisdiction over plaintiff's claims against the State defendants. See Memorandum of Law in Support of the State Defendants' Motion to Dismiss the Complaint, at 14-23, 88 Civ. 1123 (JMC) (S.D.N.Y. July 11, 1988) ["State Defendants' Memorandum"]; see also Zimmerman v. Grievance Committee, 726 F.2d 85, 86 (2d Cir.), cert. denied, 467 U.S. 1227 (1984). Fourth, plaintiff lacks standing to assert claims against the current rules and regulations of the First Department or to compel disciplinary proceedings against the Grievance Committee defendants. See State Defendants' Memorandum, at 24-32. Finally, the Court lacks personal jurisdiction over the Florida Bar defendants. See Memorandum of Law in Support of Motion to Dismiss by the Florida Bar, Norman Faulkner and E. Earle Zehmer, at 3-4, 88 Civ. 1123 (JMC) (S.D.N.Y. May 17, 1988).

4.Plaintiff did not obtain the Court's permission before serving the Supplemental Complaint in violation of Rule 15(d). See Fed. R. Civ. P. 15(d).

Statutory Provisions Involved

N.Y. Judiciary Law § 90(10)

> Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their dis-

cretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a

statute of the District of Columbia.

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

. . . .

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objec-

tions in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(2)

No. 90-638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN BABIGIAN,

Petitioner,

– against –

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT MCGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PIERPOINT, NINA CAMERON, ADLAI HARDIN, JR., JOSEPH W. BELLACOSA, RICHARD W. WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, WILLIAM J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER

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QUESTION PRESENTED[1]

Whether the New York statute of limitations bars petitioner's claims which accrued in 1975 where the complaint demonstrates that the limitations period cannot be tolled and where petitioner admits that he intentionally waited thirteen years before filing a complaint in the federal court.

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[1] Respondents note that although petitioner lists some five questions for presentation to this Court, the lower courts found one basic issue – the application of the statute of limitations – to control the disposition of this lawsuit and mandate dismissal of the complaint. Petitioner does not assert the statute of limitations as one of the questions presented.

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TABLE OF CASES AND AUTHORITIES

No. 90-638

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OCTOBER TERM, 1990

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents Association of the Bar of the City of New York (hereafter referred to as the "Association of the Bar"), John Bonomi ("Bonomi"), former General Counsel to the Committee on Grievances of the Association of the Bar of the City of New York (Comp. ¶ 8, JA-12),[2] Robert McGuire, Patrick Wall, Adlai Hardin, Jr., Joseph W. Bellacosa, Richard W. Wallach, Stephen Kaye, Jeffrey K. Brinck, Alvin Schulman, Seth Rosner, Jonathan H. Churchill, William J. Manning, Meredith M. Brown, Robert D. Sack and Frederick C. Carver, former members of the Committee on Professional Ethics of the Association of the Bar (hereafter referred to as the "Ethics Committee") (Comp. ¶ 136, JA-140-41),

[2] References designated "JA-__" refer to the Joint Appendix of the parties filed before the Second Circuit Court of Appeals and cited throughout Babigian's petition for a writ of certiorari.

and Stanley Arkin, William Hellerstein, Powell Pierpoint, Martin Fogelman, Robert McGuire, Eleanor Piel, Patrick Wall and Nina Cameron, former members of the Committee on Grievances of the Association of the Bar (hereafter referred to as the "Grievance Committee") (Comp. ¶ 140, JA-142-43),[3] submit this brief in support of their request that this Court deny the petition of John Babigian ("Petitioner" or "Babigian") for a writ of certiorari to review the summary order of the United States Court of Appeals for the Second Circuit entered on July 19, 1990, which affirmed the dismissal of Petitioner's complaint by the United States District Court for the Southern District of New York.

INTRODUCTION

Babigian's petition for a writ of certiorari presents no special or important reason for this Court to review the decision of the United States Court of Appeals for the Second Circuit affirming dismissal of his complaint. The Second Circuit affirmed the district court's application of settled law governing application of the New York state statute of limitations to Petitioner's claims brought under 42 U.S.C. § 1983 and state law. (A-4-5).[4] The dismissal is consistent with the decisions of this Court in *Owens v. Okure*, 109 S. Ct. 573 (1989) and *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), applying New York's three year statute of limitations to Section 1983 actions brought in federal court. There is no conflict among the circuits on the issue here presented. Petitioner's 137 page complaint details that Petitioner knew of his alleged injuries and the parties involved when his causes of action accrued in 1975. In addition, Babigian specifically admits that he intentionally waited to take any action on these matters for another eleven years, and therefore did not file his complaint until 1988, a total of 13 years after the claims arose. Accordingly, as the lower courts found, under applicable state law there was no tolling of the statute of limitations. Since this Court routinely defers to the decisions of the

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[3] All of the above named Respondents are hereafter collectively referred to as the "Bar Association Defendants."

[4] References designated "A-__" refer to the Appendix submitted with Babigian's petition for a writ of certiorari.

lower federal courts on state law issues such as tolling of the state period of limitations, this case is clearly not worthy of review by this Court.

STATEMENT OF THE CASE

The complaint seeks damages and declaratory and injunctive relief under 42 U.S.C. § 1983, and alleged state common law and statutory violations. Babigian's claims against the Bar Association Defendants are all based on events surrounding the issuance of an admonitory letter to Petitioner on November 7, 1973 (the "Admonitory Letter") which alleged improprieties by Attorneys Research Inc. ("Research Inc.") (Comp. ¶ 34, JA-33), a corporation organized by Petitioner to provide legal research to attorneys in all jurisdictions (Comp. ¶ 4, JA-8), and on a subsequent disciplinary hearing (the "Grievance Committee Hearing") conducted by the Grievance Committee at Babigian's request (Comp. ¶ 53, JA-72; ¶ 55, JA-76; ¶¶ 83, 84, JA-102; ¶ 98, JA-115; ¶ 107, JA-122), which was terminated on May 16, 1975 with no further action taken against the Petitioner. (Comp. ¶ 118, JA-135-36). Indeed, as found by the lower courts, aside from the Admonitory Letter no action was ever taken against Petitioner. (A-16-17).

The gravamen of Babigian's Section 1983 claim is that the Admonitory Letter improperly disciplined him for constitutionally protected advertising and that he was denied due process during the subsequent Grievance Committee Hearing, which was held to determine (1) whether further disciplinary action should be taken against him for his refusal to provide further information and (2) whether a further hearing should be held on Babigian's request to appeal the Admonitory Letter. (Comp. ¶ 74, JA-95-99; ¶ 106, JA-122).

The complaint makes clear that Babigian timely received the Admonitory Letter (Comp. ¶ 34, JA-33-35), attended the Grievance Committee Hearing (Comp. ¶ 84, JA-102; ¶ 86, JA-104-05; ¶ 109, JA-123) and, prior to the conclusion of the hearings, was furnished with information identifying all sources of letters of complaint which had contributed to the issuance of the Admonitory Letter and commencement of the Grievance Committee Hearing. (A-23-24) (Comp. ¶ 34, JA-33-35; ¶ 111,

JA-123). The district court therefore held that "plaintiff's section 1983 claim accrued at the latest on May 16, 1975 when the Grievance Committee advised plaintiff that it was closing its file on the matter." (A-21).

Although Babigian argued before the lower courts that the statute of limitations should be tolled because it was not until 1986 that he was permitted to examine his disciplinary file which contained letters and memoranda he allegedly had not seen until that time, his complaint details that in 1975, during the period in which the Grievance Committee Hearing was being conducted, he filed a proceeding in federal court to enjoin the Grievance Committee Hearing in which he charged Respondent Bonomi with committing bad faith actions in concert with others. (Comp. ¶ 57, JA-80; ¶ 82, JA-101-02; ¶ 105, JA-122). Babigian's complaint in the instant case actually quotes from the affidavit which he filed in support of his 1975 federal injunction action. (Comp. ¶ 57, JA-80; ¶ 82, JA-101-02). The complaint also admits that in the course of litigating his 1975 federal action, Babigian received the initial complaint letters sent by the Florida Bar. These letters specifically put Babigian on notice that the Florida Bar Defendants[5] together with Bonomi had played a role in commencement of the Grievance Committee Hearings. (Comp. ¶ 111, JA-123). Similarly, Babigian admitted in papers filed before the district court that he intentionally waited eleven years for Bonomi to leave office before he asked to inspect his file pursuant to New York Judiciary Law § 90(10) (McKinney 1983). (JA-227-28).

On this record the district court properly held that Petitioner "knew the basic facts necessary to institute his claim" in 1975 and "did not act with due diligence in seeking to obtain the documents in his disciplinary file." (A-25-26). Babigian's complaint was not filed until 1988. The statute of limitations applicable to Petitioner's Section 1983 and state law claims was not tolled, and because the running of the statute of limitations was apparent from the face of the complaint, the district court properly utilized Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss this complaint in its entirety.

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[5] "Florida Bar Defendants" refers to respondents herein the Florida Bar, Norman Faulkner and E. Earle Zehmer, members of the Florida Bar.

REASONS FOR DENYING THE WRIT

DISMISSAL OF PETITIONER'S SECTION 1983 AND STATE LAW CLAIMS ON STATUTE OF LIMITATIONS GROUNDS DOES NOT RAISE ANY IMPORTANT FEDERAL QUESTIONS

The instant petition falls far below the threshold requirements for a grant of a writ of certiorari and does not warrant consideration by this Court. Although Petitioner has attempted to frame his questions presented in a manner to suggest that this case raises issues of due process, the fact remains, as the lower courts found, that the only issue in the instant litigation is whether Petitioner, who "did not institute the instant action until almost thirteen years after his cause of action accrued" (A-21), is time barred from asserting these Section 1983 and state law claims at this excessively late date.

This issue is neither a "question[] of importance which . . . is in the public interest to have decided by this Court," *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923), nor a case involving "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), and accordingly does not merit review by this Court. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1950); Sup. Ct. R. 10.1. "[Certiorari] jurisdiction [is] not [to be] conferred . . . merely to give the defeated party in the Court of Appeals another hearing." *Magnum*, 262 U.S. at 163.

Both lower courts in this instance applied the long established rule for accrual of Section 1983 claims, *i.e.*, that such claims accrue and the period of limitations begins to run when a " 'plaintiff knows or has reason to know of the injury which is the basis of [his] action,' " *Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983) (quoting *United States v. Kubrick*, 444 U.S. 111, 122 (1979)); *Pauk v. Board of Trustees*, 654 F.2d 856, 859 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), and both courts

properly found from the allegations of Babigian's complaint discussed above, that Babigian had full knowledge in 1975 of all necessary facts which form the basis of the purported constitutional and state law injuries here alleged. (A-4-5; A-21).

Petitioner's attempt to evade the obvious statute of limitations bar under a tolling theory is unavailing. Questions of tolling in Section 1983 actions, like the limitations period, are governed by state law, *Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *accord Board of Regents v. Tomanio*, 446 U.S. at 486, and absent some reason which would make their application inconsistent with the policies of deterrence and compensation underlying Section 1983 claims, state tolling rules are "binding rules of law" in Section 1983 actions. *Id.* at 484; *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1978). Mindful of the broad sweep required in assessing the allegations of a complaint under Rule 12(b)(6), both lower courts here found that the facts which Babigian himself set forth in his complaint foreclosed any recognized legal basis for tolling the limitations period under New York law. (A-4-5; A-23-24).[6]

New York's tolling rules present no conflict with federal interests and are consistent with the policies of deterrence and compensation underlying Section 1983 actions. Indeed, this Court has previously noted that "no federal policy – deterrence, compensation, uniformity, or federalism – [is] offended by the application of state tolling rules." *Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983). New York's tolling rules with respect to fraudulent concealment are consistent with federal policies as they merely require plaintiffs to commence their Section 1983 actions within three years of the time they know of their injury

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[6] These findings are consistent with New York law. *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 127-29, 219 N.E.2d 169, 170-71, 272 N.Y.S.2d 337, 339-40 (1966); *Jordan v. Ford Motor Co.*, 73 A.D.2d 422, 424, 426 N.Y.S.2d 359, 360-61 (4th Dep't 1980); *Erbe v. Lincoln Rochester Trust Co.*, 13 A.D.2d 211, 213-14, 214 N.Y.S.2d 849, 852-53 (4th Dep't 1961), *appeal dismissed*, 11 N.Y.2d 754, 181 N.E.2d 629, 226 N.Y.S.2d 692 (1962); *see also Augstein v. Levey*, 3 A.D.2d 595, 598, 162 N.Y.S.2d 269, 273 (1st Dep't 1957) ("[e]stoppel . . . may not be grounded on the later discovery of evidentiary details confirmatory of the basic facts"), *aff'd*, 4 N.Y.2d 791, 149 N.E.2.d 528, 173 N.Y.S.2d 27 (1958).

and to act with diligence to discover critical facts. *See Burnett v. Grattan*, 468 U.S. 42, 59 (1984); *Tomanio*, 446 U.S. at 488; *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978).[7]

The instant case is thus nothing more than a mundane statute of limitations case resting on the application of New York state tolling principles, and the instant petition nothing more than a request for this Court to review the construction of a state law agreed upon by the two lower federal courts. This is a task which this Court has repeatedly emphasized it is disinclined to perform. *Runyon v. McCrary*, 427 U.S. 160, 181 (1976) and cases there cited. In numerous comparable situations where, as here, a "federal right has depended upon the interpretation of state law, '[this] Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred.' " *Id.* (quoting *Bishop v. Wood*, 426 U.S. 341, 346 & n.10 (1976));[8] *accord Chardon v. Fumero Soto*, 462 U.S. 650, 654-55 & n.5 (1983); *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 630 (1946); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *see also Butner v. United States*, 440 U.S. 48, 58 (1979); *Gooding v. Wilson*, 405 U.S. 518, 524 (1972); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967). Moreover, this Court's deference to such lower court determinations regarding state law "render[s] unnecessary review of their decisions in this respect." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (quoting *Cort v. Ash*, 422 U.S. 66, 72-73 n.6 (1975)).

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[7] These rules are also fully consistent with federal tolling policies. *See, e.g., Hobson v. Wilson*, 737 F.2d 1, 35 & n.107 (D.C. Cir. 1984) (statute of limitations begins to run when a "duly diligent" plaintiff would have discovered that which was concealed), *cert. denied*, 470 U.S. 1084 (1985); *Pacyna v. Marsh*, 617 F. Supp. 101, 102 (W.D.N.Y. 1984), *aff'd*, 809 F.2d 792 (2d Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987).

[8] This Court has followed this principle even in situations where, unlike the present case, " 'examination of the state law issue[s] without [lower court] guidance might have justified a different conclusion.' " *Id.*

This case presents no "special and important reasons" within the meaning of Rule 10.1 for this Court to devote its limited resources to reconsider the legally sound determinations of the lower courts.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 16, 1990

Respectfully submitted,

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No. 90-638 (3)

In The

Supreme Court of the United States

October Term 1990

JOHN BABIGIAN,

Petitioner

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, "NERVOUS NELLIE" DOE, "HORNY HELEN" DOE, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT MCGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PEIRPONT, NINA CAMERON, FRANCIS T. MURPHY, Individually and as Chief Justice of the Appellate Division of the State of New York: First Department, APPELLATE DIVISION OF THE STATE OF NEW YORK: FIRST DEPARTMENT, MICHAEL GENTILE, as Chief Counsel of the Departmental Disciplinary Committee of the Appellate Division: First Department, HAROLD J. REYNOLDS, Clerk of the Appellate Division: First Department, THE FLORIDA BAR, NORMAN FAULKNER, E. EARLE ZEHMER, ADLAI HARDIN, JR., JOSEPH W. BEL-LACOSA, RICHARD WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, JAMES R. HAWKINS, WILLIAMS J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. WHETHER THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT AGAINST THE FLORIDA BAR DEFENDANTS FOR LACK OF IN PERSONAM JURISDICTION?

2. WHETHER THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT FOR FAILURE TO TIMELY FILE UNDER THE APPLICABLE STATUTES OF LIMITATIONS. (BRIEF OF OTHER DEFENDANTS ADOPTED.)

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STATUTORY PROVISIONS INVOLVED

New York C.P.L.R. § 302. Personal Jurisdiction by Acts of Non-domicilaries.

a. Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state;

or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state; or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

(iii) owns, uses or possesses any real property situated within the state.

STATEMENT OF THE CASE

On February 10, 1988, Plaintiff/Petitioner John Babigian ("Babigian") filed a sixty-seven page complaint containing one hundred fifty-four paragraphs against thirty-two defendants. Among the defendants were the Florida Bar, which has its headquarters in Tallahassee, Florida and Norman Faulkner and E. Earle Zehmer, each of whom resided in Florida ("The Florida Bar Defendants"). The Florida Bar Defendants filed a motion to dismiss for lack of in personam jurisdiction and the remaining defendants filed a motion to dismiss for failure to file within the applicable statute of limitations and other various grounds.

On January 11, 1990, the District Court granted all motions to dismiss including in particular, the motion of the Florida Bar Defendants. This decision was affirmed on appeal August 10, 1990.

SUMMARY OF THE ARGUMENT

If long-arm jurisdiction exists, it would have to be under New York C.P.L.R. § 302. The factual allegations of the complaint which make reference to the Florida Bar Defendants fail to assert the necessary elements to acquire long-arm jurisdiction under any provision of the statute. The Florida Bar adopts the briefs of other defendants in support of the district court's dismissal for failure to timely file under applicable statute of limitations.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT AGAINST THE FLORIDA BAR DEFENDANTS FOR LACK OF IN PERSONAM JURISDICTION.

Petitioner has invoked jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Certiorari will be granted to review judgments of the United States Court of Appeals where inconsistent decisions of the Court of Appeals exist and there is need for uniformity on the issue. Magnum Import Company v. Haubigant, Inc. 262 U.S. 161, 67 L.Ed. 922, 159 S.Ct. 164, (1922); Commissioner v. Bilder, 369 U.S. 499, 8 L.Ed. 2d 65, 82 S.Ct. 881 (1962). Dismissal of Babigian's complaint against the Florida Bar Defendants was not inconsistent with existing law.

Specifically, the complaint was dismissed against the Florida Bar Defendants on the basis that the Court lacked in personam jurisdiction. Paragraph two of the complaint alleged that all three of the Florida Bar Defendants were citizens of and did business in the State of Florida. As there is no federal statute extending long-arm jurisdiction over the Florida citizens for

the facts alleged, in personam jurisdiction can only be had based upon the New York long-arm statute, New York C.P.L.R. § 302, which provides in pertinent part:

> Personal jurisdiction by acts of Non-Domicilaries
>
> a. Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domicilary or his executor or administrator, who in person or through an agent:
>
> ••••
>
> (2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act...

New York has given a restrictive interpretation to this provision. It is not sufficient, for purposes of this subsection, that a tortious act be committed outside the state resulting in injury in the state. Rather, it has been held necessary that defendant actually be physically present within the state of New York at the time of the allegedly tortious act. Dogan v. Harbert Construction Corporation, 507 F. Supp. 254 (S.D.N.Y. 1980); American Edestal, Inc v. Maier, 460 F.Supp. 613 (S.D.N.Y. 1978); Lynn v. Cohen, 359 F. Supp 565 (S.D.N.Y. 1973);

The only the act of the Florida Bar Defendants alleged in the complaint which has any connection with the state of New York is the sending of two letters by Defendant Faulkner to the General Counsel of the New York State Bar Association. Mailing of letters into New York, even when alleged to be a tortious act, are insufficient to establish long-arm jurisdiction under § 302. American Edestal, supra. See also Fox v. Boucher, 794 F.2d 34 (2nd Cir. 1986) (Tortious telephone telephone call to party in New York from outside the state is not sufficient to establish jurisdiction).

Babigian attempts to distinguish this well established line of cases by making conclusory allegations of a conspiracy involving the Florida Bar Defendants along with the remaining defendants. There are situations where a person is subject to the New York long-arm jurisdiction on the basis that his co-conspirator was committing the tortious activities in New York. Ghazoul v. International Management Services, Inc., 398 F. Supp 307 (S.D.N.Y. 1975). However, bald allegations of conspiratorial acts or agency are insufficient to form the basis of jurisdiction. In Singer v. Bell, 585 F. Supp. 300, 303 (S.D.N.Y. 1984), the Court stated:

> Instead, plaintiffs must make a prima facia showing of conspiracy. They must allege specific facts warranting the inference that the defendants were members of the conspiracy, and come forward with some definite evidentiary facts to connect the defendants with transactions occurring in New York.

As in Singer, the specific facts alleged in the complaint clearly do not establish any basis for a conspiracy. They also fail to establish an agency relationship between The Florida Bar and Bonomi existed.

Federal courts, including this Court, and New York courts have held that the agency relationship which subjects a non-domicilary to jurisdiction under Section 302 requires that the agent have acted for the benefit of the non-resident defendant and that the defendant have retained a degree of control over the agent. Grove Press, Inc. v. Angleton, 649 F.2d 121 (2d Cir. 1981); Marsh v. Kitchen, 480 F.2d 1270 (2d Cir,. 1973); Louis Marx & Inc. v. Fugi Seiko Co., Ltd., 453 F. Supp. 385 (S.D.N.Y. 1978); Legros v. Irving, 354 N.Y.S. 2d 47 (S.Ct..1973); Collateral Factors Corp v. Meyers, 330 N.Y.S. 2d 833, 39 A.D. 2d 27 (N.Y.S.C., App. Div. 1972). In the case at Bar, the Florida Bar Defendants are alleged to have simply sent letters to the General Counsel for the New York Bar requesting the New York Bar to consider taking action against the Plaintiff. There was no allegation of any retention

control over the New York Bar and no such allegation could be sustained. Clearly, The Florida Bar has no control whatsoever over the decision of The New York State Bar Association as to whether or not to take disciplinary action against an individual. Additionally, the complaint indicates no benefit to be derived by the Florida Bar Defendants. For purposes of the New York Statute, an intended general benefit to the government or to the the public at large is insufficient to subject public servants to The New York Long Arm Long Statute for acts taken in their official capacities. Grove Press, Inc. v. Angleton, 649 F. 2d 121 (2nd Cir. 1981). Hence the trial court and the appellate court's decision to dismiss the complaint against the Florida Bar Defendants was consistent with existing case law.

Finally, Babigian argues that the district court erred by failing to receive affidavits before ruling on the motion of the Florida Bar Defendants. He argues that the court cannot dismiss for want of jurisdiction without discovery. Cases which he cites are clearly inapplicable to a complaint, such as that in the case at bar, where the allegations themselves fail to state a cause of action. In short, the complaint utterly fails to allege the minimum facts necessary to establish long arm jurisdiction and the district court was correct in dismissing the complaint for lack of jurisdiction.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT FOR FAILURE TO FILE WITHIN THE TIME LIMITS OF THE APPLICABLE STATUTE OF LIMITATIONS.

The District Court also dismissed the complaint on the ground that the Plaintiff failed to file the action within the time limitations established by the applicable statutes of limitations. The Florida Bar Defendants join the briefs filed by the other defendants in this action in support of this ground.

CONCLUSION

The decisions of the lower courts were not divergent from existing case law, hence, Babigian's Petition for Writ of Certiorari should be denied under 28 U.S.C. § 1254(1).

Respectfully submitted,

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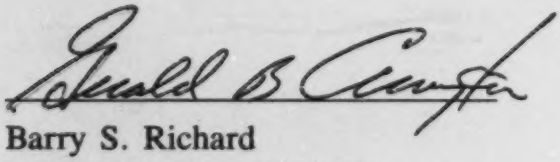

Barry S. Richard
Florida Bar No: 0105599

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been served by U.S Mail/Hand Delivery on John Babigian, Petitioner Pro Se, One Christopher Street, New York, New York, 10014; Thomas J. Schwarz, Jay S. Berke, Rosalie B. Shields of Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022; James M. Davis, Jo-Anne Weissbart, at Owen & Davis, 605 Third Avenue, New York, New York 10158; Robert Abrams, Attorney General for the State of New York; 120 Broadway, New York, New York, 10271 this 20 day of November, 1990.

Barry Richard